Supreme Court, U. S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-6153

FRANCIS RICK FERRI,
Petitioner,

vs.

DOMINICK ROSETTI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Statement of the Case

On January 21, 1974, Attorney Dominick Rosetti, respondent, was appointed by the United States District Court for the Western District of Pennsylvania, under the Criminal Justice Act, 18 USCA § 3006a, to represent Francis Rick Ferri, petitioner, in a Grand Jury investigation. The Grand Jury investigation had nothing to do with the charges for which the petitioner was ultimately convicted. There were a number of telephone conversations between the respondent and the Federal Strike Force regarding Mr. Ferri's possible cooperation with the Grand Jury. On one occasion, the respondent met with the Strike Force attorneys and Mr. Ferri in the Allegheny County Jail. Mr. Ferri's condition for

cooperation was immunity in a case which was then being investigated. Ultimately, the Federal investigators found that they did not need Mr. Ferri's cooperation, and immunity was never granted. The respondent was eventually tried and convicted, and is presently serving a sentence at the United States Penitentiary at Lewisburg, Pennsylvania. He was never called before the Grand Jury.

Subsequently, the petitioner was indicted and convicted in the District Court, arising out of the bombing of a Mr. Dunn's automobile in 1971. In a pretrial motion, the respondent appeared as a witness for the petitioner and was attempting to aid petitioner in his motion. Interestingly, subsequent to his conviction, the petitioner has brought a malpractice suit against the attorney, Mr. Ackerman, representing him in the bombing case.

The subject matter of the Grand Jury investigation for which the Strike Force was eliciting the petitioner cooperation dealt with the arson trial of persons accused of setting fire to the Bedford Hotel. When the petitioner received notice to appear before the Grand Jury, the Bedford Hotel case was then in progress in Federal Court, and the Federal prosecutors were attempting to gain the cooperation of the petitioner. This prompted the telephone calls and the meeting at the County Jail. Ultimately, the Federal prosecutors found that they did not need the petitioner's help to gain a conviction, and thus no immunity was ever granted.

The gravamen of the petitioner's complaint against his former attorney is that the Government attorneys had given written assurances of immunity and that these written assurances were contained in a file of the respondent, which the respondent supposedly lost. The allegation of negligence is for the loss of petitioner's file, supposedly assuring him of immunity from Federal prosecution.

REASONS FOR DENYING THE WRIT

According to Rule 19(1)(a) of the Supreme Court Rules the grant of a writ of certiorari to review a matter decided in a state court system may only proceed where jurisdiction has been properly invoked. Rule 19(1)(a) indicates that a petitioner seeking such review must make a showing that the state court had either decided a federal question of substance that had not theretofore been resolved by the Supreme Court, or had decided it in a way probably not in accord with applicable decisions of the Supreme Court.

Respondents submit that the Supreme Court of Pennsylvania decided the question at issue consistent with federal case law and in a manner which comports with recent pronouncements of this Honorable Court.

I. The disposition of the petitioner's case in the courts of the State of Pennsylvania was in accord with federal case law conferring absolute immunity to criminal defense attorneys made available to indigent clients by court order.

Recent federal decisional law has consistently denied relief to indigent criminal defendants who, as plaintiffs in malpractice actions, seek to recover money damages from private attorneys earlier appointed to represent them pursuant to the Criminal Justice Act. These decisions are premised upon a uniform application of the rule requiring that attorneys, appointed by the federal courts under the authority of the Justice Act, be accorded absolute immunity from litigation instituted by their clients.

In *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966), a federal prisoner sued a judge, an FBI agent, and his own court-

appointed attorney. In specifically holding that a court-appointed lawyer in a federal criminal case is immune from civil liability, the court first determined that a court-appointed attorney takes on the status of a judicial officer when acting in his court-appointed role. The *Jones* court further reasoned that as a judicial officer, the attorney must be cloaked with judicial immunity. *See also Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976).

In the Third Circuit, immunity has been extended to state public defenders, and to attorneys being sued under civil rights statutes: the former in *Brown v. Joseph*, 463 F.2d 1046 (3rd Cir. 1972), *cert. den.* 412 U.S. 950 (1973), and the later in *Waits v. McGowan*, 516 F.2d 203 (3rd Cir. 1975). In its well-reasoned opinion, the *Brown* court specifically held that: "a County Public Defender created under the Pennsylvania statute, enjoys immunity from liability."

Similarly, the Fifth, Ninth, and Seventh Circuits have recently granted absolute immunity from civil suit to the court-appointed attorneys of indigent criminal defendants. See *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971); *O'Brien v. Colbath*, 465 F.2d 358, 359 (5th Cir. 1972); *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977). The Seventh Circuit at one time granted a "qualified immunity" to the court-appointed counsel of indigent criminal defendants, but now holds that such counsel are entitled to absolute immunity from suit initiated by their clients, *Caruth v. Geddes*, 443 F.Supp. 1295 (N.D. Ill. 1978); *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir., 1978).

II. The decision of the Supreme Court of Pennsylvania is in full accord with public policy and applicable decisions of this Court.

The number of court-appointed attorneys has grown rapidly since this Honorable Court first ruled that indigent criminal defendants were entitled to the benefit of legal representation at public expense, *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is in the public interest that capable attorneys be encouraged to take on indigent clients at a non-negotiable fee with a maximum limit. If such court-appointed defense counsel were not granted immunity from tort liability arising out of their services to indigent clients, many would refrain from defending indigent clients and the criminal justice system would be significantly impaired.

Furthermore, it would be manifestly unfair to require private practitioners to help fulltime defenders bear the heavy work load imposed by the number of cases involving indigent criminal defendants without granting them full immunity. Your Honorable Court has held that state court judges are not liable for damages under 42 U.S.C.A. § 1983 (1970), otherwise known as the Civil Rights Act. *Pierson v. Ray*, 386 U.S. 547 (1967). This immunity was also extended to public prosecutors in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In addition, this Honorable Court has recently reviewed the doctrine of judicial immunity for participants in judicial proceedings and has indicated that such immunity is properly justified by sound reasons of public policy. *Butz v. Economou*, 98 S.Ct. 2894 (1978). Admittedly this Court in *Butz* held that some federal executive officials are entitled only to qualified immunity, but was quick to point out that as to those federal officers working within the judicial system, "[a]bsolute immunity is . . . necessary to assure that judges, advocates, and

witnesses can perform their respective functions without harassment or intimidation." 98 S.Ct. at 2914.

The Petitioner attempts to distinguish his case from the cited cases on the grounds that the alleged file material was not lost until one year after legal representation ceased, and that the respondent was acting in an administrative capacity. Both contentions are without a basis in fact. At all times the Respondent was attempting to fulfill his duty to the petitioner as an attorney appointed under the Criminal Justice Act.

Finally, it is important to note that the availability of absolute immunity from tort liability to court-appointed defense attorneys in no way limits the ability of society to remedy the inequities that might arise from the court-appointed attorneys' improper handling of a legal defense. In a criminal case, the criminal defendant is not left without an adequate legal remedy should errors of defense counsel be established. For instance, if the errors of defense counsel amount to ineffectiveness of counsel, the criminal defendant will be awarded a new trial. Furthermore, invaded federal rights may be asserted by direct appeal via state post-conviction remedies, and by federal *habeas corpus* petitions. Similarly, as *Imbler* pointed out, immunity from civil suit will not work to hamper the public in admonishing judicial misconduct. The recalcitrant court-appointed attorney is still subject to disciplinary procedures by the Bar Association and to criminal process for actions amounting to crimes as defined by the criminal statutes.

Conclusion

Inasmuch as the law and public policy dictate that court appointed counsel for indigent criminal defendants have judicial immunity, the Respondent asserts that Petitioner's Petition For Writ of Certiorari has raised no special or important legal issues for resolution by this court and should be denied.

Respectfully submitted,

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